

1                   **IN THE SUPREME COURT OF THE STATE OF ALASKA**

2 HONORABLE MICHAEL J. DUNLEAVY,   )  
3 in his official capacity as Governor   )  
4 for the State of Alaska,                )

5                                   Appellant,                )

6                                   v.                                )

7 THE ALASKA LEGISLATIVE COUNCIL,   )  
8 on behalf of THE ALASKA STATE       )  
9 LEGISLATURE.                                )

10                                   Appellee.                                )

Supreme Court No.: S-18003

11 Trial Court Case No.: 1JU-20-00938 CI

12                   **APPELLEE'S OPPOSITION TO APPELLANT'S EMERGENCY MOTION**  
13                   **TO EXPEDITE APPEAL**

14                   Appellee the Alaska Legislative Council ("Legislative Council") on behalf of  
15 the Alaska State Legislature ("Legislature"), by and through counsel, hereby opposes  
16 Appellant Governor Dunleavy's Emergency Motion to Expedite Appeal.

17                   **ARGUMENT**

18                   This case involves a challenge to Governor Dunleavy's attempt to continue the  
19 appointments of appointees presented for confirmation to the Legislature during the  
20 Second Regular Session of the Thirty-First Alaska State Legislature, in violation of art.  
21 III, secs. 16, 25, 26, and 27 of the Alaska Constitution; chapter 9, SLA 2020 ("HB  
22 309"); and AS 39.05.080. Legislative Council opposes Governor Dunleavy's motion  
because the facts and circumstances do not warrant an expedited appeal in this case.

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Appellee's Opposition to Appellant's Emergency Motion to Expedite Appeal

**1. An expedited appeal is not warranted because the Governor has now resubmitted the names of his appointees to the Legislature.**

Alaska law on appointments is set out in AS 39.05.070 *et seq.* AS 39.05.080(3) provides, in relevant part, "Failure of the legislature to act to confirm or decline to confirm an appointment during the regular session in which the appointment was presented is tantamount to a declination of confirmation on the day the regular session adjourns." The main issue in the underlying lawsuit involved HB 309, a narrowly tailored law passed by the Legislature during the unprecedented COVID-19 pandemic.<sup>1</sup> HB 309 set out procedures for confirmation of the Governor's appointments presented during the Second Regular Session of the Thirty-First Alaska State Legislature. The primary effect of HB 309 was to extend AS 39.05.080(3)'s declination of confirmation date from "the day the regular session adjourns" to December 15, 2020. As the superior court found, the Governor's appointments were rejected as of December 15, 2020, and the Governor's attempt to reappoint the same appointees on December 16, 2020, as recess appointments was prohibited by law.

On January 19, 2021, a new legislative session began. Under AS 39.05.080(3), once a new legislative session begins, the Governor is free to reappoint a person declined by the previous legislature. Legislative Council has never disputed the Governor's authority to resubmit the names of appointees who were rejected by

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<sup>1</sup> Chapter 9, SLA 2020.

operation of law once a new legislative session began. The Governor has now resubmitted the names of his appointees to the new Legislature, and HB 309 is not applicable to these reappointments. The statute that is applicable if the Legislature fails to vote on an appointment before adjourning, AS 39.05.080(3), is a law that has been applicable every year since its enactment in 1964. The procedure set forth in AS 39.05.080(3) is not new and its challenge does not provide grounds for an expedited appeal.<sup>2</sup> The superior court upheld this long-standing procedure, explaining that "inaction on an appointment equals rejection" has been the law since before Statehood. If an emergency exists as the Governor contends, the "emergency" has existed since 1964.

**2. An expedited appeal is not warranted because there is no evidence that the Legislature will fail to meet in joint session.**

The Governor has submitted no evidence that the Legislature will fail to meet in joint session, and its assertion that the Legislature may fail to do so is purely speculative. Any harm the Governor contends he will suffer if expedited appeal is not granted is likewise speculative and without factual support. The Legislature passed HB 309 last session during the unprecedented COVID-19 pandemic and in response to

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<sup>2</sup> The Legislature also disputes the Governor's alleged immediate need to "provide clarity to both branches of government" with respect to appointment procedures. Again, the statute that governs the procedure of appointments, AS 39.05.080, has been in place for decades. The branches of government are familiar with these longstanding procedures, which were upheld by the superior court.

1 concerns that the Thirty-First Alaska State Legislature would not be able to meet or  
2 would even be prohibited from meeting in joint session due to the pandemic. The  
3 Legislature has never before failed to confirm a large number of appointees, because  
4 there had never before been such a pandemic.

5 This session, the Governor resubmitted the names of his previously rejected  
6 appointees to the Legislature under AS 39.05.080, along with nearly 100 new  
7 appointments, and the Legislature is holding hearings and considering those appointees  
8 in accordance with the normal confirmation procedure. The Legislature commonly  
9 votes on appointees toward the end of session because of the time it takes to consider  
10 each appointee, and there is no evidence that the Legislature will fail to do so this  
11 session. There is currently no bill pending which would extend the time period by  
12 which the Legislature must confirm the Governor's appointees, and every indication is  
13 that the Legislature will act on the Governor's appointees before "the day the regular  
14 session adjourns," as provided in AS 39.05.080(3).

15 **3. An expedited appeal is not warranted because the Governor may call**  
16 **the Legislature into joint session or special session.**

17 If the Governor is concerned that the Legislature will fail to meet in joint session  
18 before the regular session adjourns, the Governor is not without remedy. The Governor  
19 may call the Legislature into joint session under art. III, sec. 17 of the Alaska  
20 Constitution or into special session under art. II, sec. 9 of the Alaska Constitution.

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1                   **4. If expedited appeal is granted, the briefing schedule for expedited**  
2                   **appeal should be based on the 120-day constitutional deadline for**  
3                   **adjournment.**

4                   Alternatively, if the Court agrees with the Governor and orders an expedited  
5                   appeal, Legislative Council respectfully requests that the Court set a briefing schedule  
6                   based on the 120-day constitutional deadline for adjournment, with oral arguments no  
7                   earlier than May 7, 2021. The Legislature has typically, especially in more recent  
8                   years, adjourned around the 120-day deadline set out in art. II, sec. 8 of the Alaska  
9                   Constitution.<sup>5</sup> The Legislature is required to pass a budget before it adjourns, and  
10                  organization of the house was delayed by a month, making it extremely unlikely the  
11                  Legislature will be able to adjourn prior to the 120-day constitutional deadline of May  
12                  19, 2021.

13                                   **CONCLUSION**

14                  For all the reasons set forth above, Legislative Council respectfully requests that  
15                  this Court deny Appellant Governor Dunleavy's Emergency Motion to Expedite  
16                  Appeal.

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19                  <sup>5</sup> The 1985-2007 regular legislative sessions were quite consistently around 120 days. The  
20                  2008-2015 regular legislative sessions were 90-98 days, most often 90-91. However, since  
21                  2016, the legislature has returned to the prior trend of adjourning around day 120. The dates  
22                  the legislature adjourned its regular legislative session for the most recent years is as follows:  
in 2016 it adjourned May 18th; in 2017 it adjourned May 17th; in 2018 it adjourned May 13th  
and in 2019 it adjourned May 15th. In 2020, the legislature went on an extended recess due  
to the COVID-19 pandemic and then adjourned on May 19th.

Respectfully submitted this 25<sup>th</sup> day of February 2021.



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